

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ELLIOT LAKE WATER COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 88-20

FINAL ORDER

This matter is the appeal of Order No. DE 88-109 issued by the Department of Ecology to Elliot Lake Water Company on January 22, 1988.

Elliot Lake Water Company filed its Notice of Appeal on February 26, 1988. Settlement was pursued but not achieved. In a telephone conference with the Board on March 24, 1989, the parties agreed to submit the matter on affidavits for decision by the Board.

On April 7, 1989, appellant water company filed the affidavit of Keith Bowers, incorporating status reports of counsel dated August 16,

1 August 29 and November 10, 1988. On April 10, 1989, respondent agency
2 filed the affidavit of M. Edward Garling with Exhibits No. 1-3
3 attached. Subsequently on May 2, 1989, respondent agency filed the
4 Supplemental Affidavit of M. Edward Garling with Exhibits No. 4
5 through 10 attached.

6 The Board, having considered the foregoing documents and the
7 files and records herein makes the following:

8 FINDINGS OF FACT

9 I

10 Ben Blair Dam is an earth embankment located in Benton County,
11 Washington, approximately two miles south of the city of Kennewick on
12 a small, unnamed tributary of the Columbia River. The 25-feet-high
3 dam can impound about 90 acre feet of water. The reservoir behind the
14 dam is known as Elliot Lake.

15 The drainage basin above the reservoir is approximately 3.4
16 square miles, mostly rolling grassland with some orchards. There is
17 residential development around the reservoir. Future residential
18 growth is planned below the dam. The reservoir is fed by springs and
19 seepage, in addition to watershed runoff.

20 II

21 What is now Elliot Lake was developed by a Mr. Elliot as an
22 irrigation pond in the late 1930's for farming adjacent land. Ben
23 Blair acquired the property in the late 1940's and continued to use
24 the pond for irrigation purposes. He made some improvements to the
25

1 impoundment of facilities in the 1950's .

2 In the early 1970's Mr. Blair subdivided a portion of his
3 ownership in the vicinity of the reservoir into Empire Lakeside
4 Estates. Contemporaneously he incorporated the Elliot Lake Water
5 Company, drilled wells for domestic water, and installed an irrigation
6 system for the subdivision and other individual properties surrounding
7 the lake. The source of water for the irrigation system is the
8 reservoir. Mr. Blair died in February, 1979.

9 III

10 The Elliot Lake Water company is the owner and operator of Ben
11 Blair Dam and Elliot Lake reservoir.

12 IV

13 An inspection of the dam was conducted in 1978 by the United
14 State Army Corps of Engineers and the Washington State Department of
15 Ecology. A report of this inspection was published in March 1979 as
16 part of the National Dam Safety Program. Several deficiencies
17 relating to safety were found, the major concerns being inadequate
18 spillway capacity and structural stability.

19 The report classified the dam as a "high hazard" structure
20 stating that its failure would "endanger lives and cause extensive
21 property damage."

22 The record before the Pollution Control Hearings Board contains
23 nothing to contradict this classification.
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V

After the inspection and report, the Elliot Lake Water Company cooperated with the Department of Ecology in seeking to solve the problems indentified. Minor deficiencies were corrected, and construction plans and specifications were developed for the major work items (spillway reconstruction and embankment stabilization).

The plans call for creation of spillway capacity sufficient to pass the flood generated by one-half of the probable maximum precipitation in a thunderstorm. Ecology has approved the plans. However, the spillway and embankment work has not been performed.

VI

On January 22, 1988, Ecology issued an Order (docket No. DE 88-109) to the Elliot Lake Water Company requiring action as follows:

EITHER -

A. Initiate construction by April 1, 1988 in accordance with approved plans and specifications dated January 28, 1986 for the modification and improvement of Ben Blair Dam and its spillway, and complete such work on or before October 1, 1988,

OR -

B. Initiate action by April 1, 1988 to safely evacuate the water stored in Elliot Lake Reservoir behind Ben Blair Dam and by May 1, 1988, after the entire contents are evacuated, remove a sufficient portion of the dam embankment so it will no longer be capable of impounding water.

The Elliot Lake Water Company appealed the Order to this Board on February 26, 1988.

1 VII

2 Initially the parties agreed to a stay while negotiations were
3 pursued. After about a year of further discussion, Ecology asked the
4 Board to resolve the matter.

5 VIII

6 The appellant water company does not contest the Order on
7 technical or factual grounds relating to safety problems at the dam or
8 the appropriateness of the approved plans for correcting those
9 problems.

10 The company rather contends that it should be relieved of the
11 requirement of compliance because it is financially incapable of
12 carrying out the work. Indeed, the company maintains that it lacks
13 the financial capacity even to carry out the dam removal option.

14 IX

15 The Elliot Lake Water Company is a privately owned corporation
16 which serves some, but not all, of the residences in the vicinity of
17 Elliot Lake. Its only present revenue source is from water charges
18 made to customers for domestic and irrigation water. The corporation
19 is regulated by the Washington State Utilities and Transportation
20 Commission. On average it services 40 to 50 customers and the
21 revenues it generates are just sufficient to cover the cost of
22 operation and maintenance.

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X

Over the years since the safety report was issued, the water company has explored a wide variety of approaches to the problem of accomplishing the improvements called for. These include efforts to donate the structure and some land to local government and attempts to secure the formation of a public entity which could take over the facilities and issue bonds or obtain government funds to finance the work. None of the possibilities explored has resulted in anything concrete.

XI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board reaches the following:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject matter. RCW 43.21B.110.

II

The Order in question was issued pursuant to RCW 43.27A.190. That section empowers Ecology to issue Orders whenever it appears that a person is violating or about to violate any law relating to water resources administered by Ecology, or any regulation or directive issued by Ecology under such a law.

1 The Order may require that persons cease and desist from
2 offending acts or "in appropriate cases, shall order necessary
3 corrective action to be taken with regard to such acts within a
4 specific and reasonable time."

5 III

6 RCW 43.21.130(2) gives Ecology the duty to inspect the
7 construction of all dams. In connection with this function the agency
8 may require necessary changes in construction or maintenance "as will
9 reasonably secure safety to life and property." See also RCW
10 86.16.035.

11 IV

12 Under RCW 90.03.350, Ecology is assigned responsibility for
13 approving plans and specifications for dams in relation to safety. No
14 dams or controlling works are to be built or modified without
15 Ecology's safety approval.

16 RCW 90.03.350 further provides:

17 Any such dam or controlling works constructed or
18 modified in any manner other than in accordance with
19 plans and specifications approved by the department of
20 which shall not be maintained in accordance with the
21 order of the department shall be presumed to be a
22 public nuisance and may be abated in the manner
23 provided by law, and it shall be the duty of the
24 attorney general or prosecuting attorney of the county
25 wherein such dam or controlling works, or the major
26 portion thereof, is situated to institute abatement
27 proceedings against the owner or owners of such dam or
controlling works, whenever he is requested to do so
by the department. (Emphasis added.)

V

The record in the instant case amply supports the reasonableness of Ecology's Order in respect to the safety concerns at which the statutes are directed. See Bayley v. Kane, 16 Wn. App. 877, P.2d 1165 (1977).

VI

The safety hazards at Ben Blair Dam are unchallenged. Though the water company is to be commended for its efforts to find means for financing the needed corrections, we do not believe that economic hardship provides a legal excuse for non-compliance with Ecology's Order.

Where the maintenance of buildings or other structures would cause the public interest to suffer, it is no defense that a financial investment is in jeopardy. See, Eastlake Community Council v. Roanoke Associates, 82 Wn.2d 475, 513 P.2d 36 (1973); Wilbur v. Gallagher, 77 Wn.2d 306, 462 P.2d 232 (1969). Laws for the protection of public health, safety and welfare are enforceable even in the face of claims that compliance will make continuation in business infeasible or that the effect will be to force abandonment of property. See, e.g., Sittner v. Seattle, 62 Wn.2d 834, 384 P.2d 859 (1963); Thomsen v. King County, 39 Wn. App. 505, 694 P.2d 40 (1985); Easter Lake Estates, Inc. v. Iowa Natural Resources Council, 328 N.W.2d 906 (Iowa 1982).

We have been made aware of no legal principle which would relieve

1 a private corporation from the responsibility for eliminating risks to
2 health and safety which its ownership and activities impose. See,
3 Hass v. Kirkland, 89 Wn.2d 929, 481 P.2d 9 (1971). Therefore, we
4 conclude that Ecology's Order should be upheld.

5 VII

6 Unfortunately, we can impose no miraculous solution which will
7 both eliminate the long-lived safety hazard and preserve the dam and
8 reservoir. We recognize the difficulty of the situation, but believe
9 that the time for waiting has passed. Unless all the property owners
10 in the neighborhood are willing to form a public entity which can
11 finance the improvements needed, the extreme remedy of abatement may
12 be the only course remaining.

13 VIII

14 Any Finding of Fact which is deemed a Conclusion of Law is hereby
15 adopted as such.

16 From these Conclusions of Law the Board enters the following
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ORDER

The Department of Ecology's Order No. DE 88-109 is affirmed, provided that the action dates established for "1988" are hereby changed to read "1990."

DONE this 20th day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Presiding Officer

Judith A. Bendor
JUDITH A. BENDOR, Chair

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member